STATE OF MICHIGAN

COURT OF APPEALS

KATHRYN K. SLUSHER,

Plaintiff-Appellant,

v

CITY OF ADRIAN,

Defendant-Appellee.

UNPUBLISHED
May 9, 1997

No. 191721
Lenawee Circuit Court
LC No. 94-006276-NZ

Before: McDonald, P.J, and Reilly and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant. We affirm in part, reverse in part and remand.

Plaintiff's four count complaint included claims of employment discrimination based on sex, retaliation, constructive discharge, and sexual harassment. The trial court granted defendant's motion for summary disposition, which was brought pursuant to both MCR 2.116(C)(8) and MCR 2.116(C)(10), without specifying upon which subrule it was relying. Our review of the record indicates that, as to plaintiff's claims of sex discrimination, retaliation, and constructive discharge, the parties relied on matters outside of the pleadings to argue their motions. Therefore, as to those issues we will construe the motion as having been granted pursuant to MCR 2.116(C)(10). *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 705; 532 NW2d 186 (1995); *Huff v Ford Motor Co*, 127 Mich App 287, 293; 338 NW2d 387 (1983). However, as to plaintiff's claim of sexual harassment, we will construe the motion as having been granted pursuant to MCR 2.116(C)(8).[1]

Plaintiff's first contention on appeal is that the trial court erred in granting summary disposition on her claim of employment discrimination based on sex. We disagree. A trial court's determination of a motion for summary disposition is reviewed de novo. *Pinckney Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion for summary disposition under MCR 2.116(C)(10) may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* Giving the benefit of reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would leave open an

issue upon which reasonable minds might differ. *Id.* A trial court should grant such a motion if it is satisfied that the claim suffers a deficiency that cannot be overcome. *SSC Associates v General Retirement System*, 192 Mich App 360, 365; 480 NW2d 275 (1991).

Under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., a prima facie case of employment discrimination based on sex may be made by showing either disparate treatment or intentional discrimination. *Schultes v Naylor*, 195 Mich App 640, 645-646; 491 NW2d 240 (1992). Plaintiff argues a disparate treatment theory. To establish a prima facie case of sex discrimination under a disparate treatment theory, a plaintiff must show (1) that she was a member of a class entitled to protection, (2) that she was qualified and applied for an available position, and (3) that she was rejected under circumstances giving rise to an inference of illegal discrimination. *Pomranky v Zack Co*, 159 Mich App 338, 343-344; 405 NW2d 881 (1987).

The burden of proof in employment discrimination cases brought under Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.*, as stated by the United States Supreme Court in *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 252-253; 101 S Ct 1089; 67 L Ed 2d 207 (1981), also applies in employment discrimination cases brought under the Elliott-Larsen Civil Rights Act. *Sisson v Board of Regents of the University of Michigan*, 174 Mich App 742, 746; 436 NW2d 747 (1989). Under *Burdine, supra*, the establishment of a prima facie case creates a presumption that the employer unlawfully discriminated against the employee. *Burdine, supra* at 254. The defendant may rebut the presumption of discrimination by articulating (not proving) a legitimate, nondiscriminatory reason for the adverse employment decision. *Lytle, supra* at 186-187, citing *Burdine, supra* at 253-258. If the defendant articulates a legitimate, nondiscriminatory reason for the adverse action, the presumption of discrimination is dispelled, and the plaintiff bears the burden of proving both that the defendant's proffered reason was pretextual and that illegal discrimination was more likely the defendant's true motivation for the adverse employment decision. *Lytle, supra* at 187; see also *St Mary's Honor Center v Hicks*, 509 US 502, 515-517; 113 S Ct 2742; 125 L Ed 2d 407 (1993). To overcome a motion for summary disposition brought pursuant to MCR 2.116(C)(10) where the defendant has met its burden of producing a legitimate, nondiscriminatory reason for an adverse employment decision, the plaintiff must tender specific factual evidence that could lead a reasonable jury to conclude that the defendant's reasons are a pretext for the alleged illegal discrimination. See *Lytle, supra* at 187-188.

Plaintiff, a female who worked as a police officer for defendant for over sixteen years, had consistently been denied promotions and appointments. According to an agreement between defendant and plaintiff's union, defendant was required to make its promotions to Sergeant from among the top three candidates on the Sergeant's examination. In 1993, plaintiff placed second but was passed over for two promotions in favor of men who had placed third and fourth. The promotion of a male candidate from the fourth position on the list was sufficient to establish a prima facie case of employment discrimination based on sex. *Lytle, supra* at 192.

Defendant, however, articulated a legitimate, non-discriminatory reason for its failure to promote plaintiff, claiming that her lack of career advancement was due to her lack of reliability. In turn, plaintiff

has tendered specific factual evidence that could lead a reasonable jury to conclude that defendant's actual reason for not promoting plaintiff was something other than her lack of reliability. Specifically, plaintiff has presented evidence that David Emerson, the Chief of Police, told plaintiff that she was not going to go anywhere at the department because she had "messed in her own nest." While this evidence suggests that defendant's reason for consistently passing over plaintiff may have been something other than her alleged lack of reliability, plaintiff has presented no evidence that could lead a reasonable jury to conclude that it was a pretext *for sex discrimination*. Even giving the benefit of the doubt to plaintiff, the facts suggest that sex was not a factor in defendant's treatment of its employees. One of the promotions plaintiff claimed she should have received went to a woman and neither of the other two female officers complained about sex discrimination on the part of defendant. Because plaintiff has presented no evidence that sex was ever a motivating factor in defendant's treatment of it employees, we hold that the trial court did not err in granting summary disposition in favor of defendant on plaintiff's claim of sex discrimination for failure to promote. See *Lytle, supra* at 187-188. Plaintiff's claim that she was subjected to disparate treatment in regard to discipline and shift assignment must likewise fail, because plaintiff has not identified any similarly situated male employees who were treated differently for the same or similar conduct. See *Schultes, supra* at 645.

Next, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition on plaintiff's claim of retaliation. We agree. In order to establish a prima facie case of retaliation under the Elliott-Larsen Civil Rights Act, a plaintiff must establish (1) that he opposed violations of the act or participated in activities protected by the act and (2) that the opposition or participation was a significant factor in an adverse employment decision. *Booker v Brown & Williamson Tobacco Co, Inc,* 879 F2d 1304, 1310 (CA 6, 1989); *Polk v Yellow Freight System, Inc*, 801 F2d 190, 198-199 (CA 6, 1986); *Cox v Electronic Data Systems Corp*, 751 F Supp 680, 694-695 (ED Mich, 1990). In determining whether a plaintiff's claim of retaliation is sufficient to withstand summary disposition, a court should consider the shifting burden analysis of *Burdine, supra*, 450 US 252-253. See *Cox, supra* at 695, citing *Booker, supra* at 1311. Therefore, if the defendant alleges a legitimate, nondiscriminatory reason for its adverse employment decision, the plaintiff must tender specific factual evidence that could lead a reasonable jury to conclude that the defendant's reasons are a pretext for retaliation. Cf. *Burdine, supra* at 255-256; *Lytle, supra* at 187-188.

Plaintiff engaged in protected activity when she filed complaints with the Michigan Department of Civil Rights in 1982, 1985, and 1992. As discussed, *supra*, plaintiff has tendered specific factual evidence that could lead a reasonable jury to conclude that defendant's actual reason for not promoting plaintiff was something other than its proffered reason. The difference between plaintiff's claim of sex discrimination and her claim of retaliation is that, where plaintiff failed to offer any evidence of motivation on the part of defendant to discriminate on the basis of sex, plaintiff has offered evidence of a motivation on the part of defendant to discriminate in retaliation. In addition to Emerson's comment, which plaintiff took to mean that she was not promoted because she had made complaints against the department, Officer Stanley Easler testified that, based in part on his conversations with Emerson, the "general opinion" in the department is that "you are not going to be rewarded for making waves." Because plaintiff has tendered specific factual evidence that could lead a reasonable jury to conclude that defendant's proffered reason for its failure to promote plaintiff was a pretext for retaliation, we hold that

summary disposition was improper. Cf. *Burdine, supra* at 255-256; *Lytle, supra* at 187-188. Genuine issues of material fact exist as to whether plaintiff's complaints to the Michigan Department of Civil Rights were a significant factor in defendant's failure to promote plaintiff. Plaintiff is entitled to proceed on her retaliation claim.

Next plaintiff argues that the trial court erred in granting summary disposition on plaintiff's claim of constructive discharge. We disagree. Constructive discharge is not an independent cause of action but instead is dependent on an underlying claim in which it is alleged that plaintiff did not voluntarily resign but was constructively discharged. *Vagts v Perry Drug Stores*, 204 Mich App 481, 487; 516 NW2d 102 (1994). Although pled with her claim of sexual harassment, plaintiff's complaint specifically stated that the discrimination outlined in the entirety of the complaint caused her constructive discharge. Therefore, because we hold that plaintiff's claim of retaliation should have survived summary disposition, plaintiff's "claim" of constructive discharge is not defective as a matter of law due to lack of an underlying claim. Cf. *id.*; *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 796; 369 NW2d 223 (1985).

"A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign." *Mourad v Automobile Club Insurance Association*, 186 Mich App 715, 721; 465 NW2d 395 (1991). Thus, whether a constructive discharge has occurred depends on the subjective intent and objective acts of the employer rather than the subjective response of the individual employee. In the instant case, giving plaintiff the benefit of reasonable doubt, plaintiff may be able to establish that, in retaliation for her filing complaints against the department alleging discrimination, she was consistently denied promotions and forced to continue working in the same position, despite her success on the Sergeant's examination. However, plaintiff's complaint in this case is that her employment conditions did not change when she felt they should have improved by way of promotions. We hold that because defendant's alleged acts of retaliation were not acts at all, but instead were omissions that did not *alter* plaintiff's employment conditions, plaintiff cannot show that defendant made her working conditions unreasonably intolerable. Cf. *Vagts*, *supra* at 488; *Mourad*, *supra* at 721.

Plaintiff's final contention on appeal is that the trial court erred in granting defendant's motion for summary judgment brought pursuant to MCR 2.116(C)(8) as to plaintiff's claim of sexual harassment. We disagree.

A motion for summary disposition based on a failure to state a claim tests the legal sufficiency of a claim by the pleadings alone. All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusion that can be drawn from the facts. The motion should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Jackson v Oliver*, 204 Mich App 122, 125; 514 NW2d 195 (1994).

Plaintiff and defendant agree that plaintiff did not allege that defendant engaged in conduct or communication that was sexual in nature. A claim of hostile work environment sexual harassment requires a showing that the employee was subjected to unwelcome sexual conduct or communication. *Radtke v Everett*, 442 Mich 368, 382; 501 NW2d 155 (1993). This Court, in *Koester v City of Novi*, 213 Mich App 653, 669-670; 540 NW2d 765 (1995), held that unwelcome sexual conduct or communication meant conduct or communication that was overtly sexual in nature. Because plaintiff has not alleged conduct or communication that was overtly sexual in nature, plaintiff's claim of hostile work environment sexual harassment is clearly unenforceable as a matter of law. Therefore, the trial court properly granted defendant's motion for summary disposition as to plaintiff's claim of sexual harassment. *Johnson, supra* at 125.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Peter D. O'Connell

I concur in result only.

/s/ Maureen Pulte Reilly

[1] In its reply to plaintiff's response to defendant's motion, defendant indicated that it was bringing its motion for summary disposition as to plaintiff's claim of sexual harassment under MCR 2.116(C)(8), and at the hearing on the motion defendant argued that plaintiff's complaint failed to state a claim.